ORIGINAL

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

ROBBY JOE TREVINO AND LAURIE DALE REED, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ALISHA TREVINO, AND AS NEXT FRIEND OF A.N., A MINOR *PLAINTIFFS,*	§	
V.	§	**CIVIL ACTION NO.**
CITY OF FORT WORTH, FORT WORTH POLICE DEPARTMENT, FORT WORTH POLICE OFFICER JACOB S. HINZ, FORT WORTH POLICE OFFICER THOMAS HAUCK, FORT WORTH POLICE OFFICER MATTHEW MCMEANS, FORT WORTH POLICE OFFICER C. MCANULTY, FORT WORTH POLICE OFFICER D. KOPLIN, FORT WORTH POLICE OFFICER J. GARCIA, AND FORT WORTH POLICE OFFICER SEAN R. LACROIX *DEFENDANTS.*	§	**4:17-cv-00227-A**

DEFENDANT CITY OF FORT WORTH'S RESPONSE TO PLAINTIFFS' MOTION FOR NEW TRIAL AND BRIEF IN OPPOSITION

Defendant City of Fort Worth (hereinafter "Defendant City" or "City") files this Response and Brief in Opposition to Plaintiffs' Motion for New Trial and would respectfully show the Court as follows:

I. PROCEDURAL HISTORY

On June 30, 2017, Eric Douglas filed a Notice of Appearance and Designation as Lead Counsel for Plaintiffs. [Document 30]. On August 30, 2017, Jeff Wise entered an appearance as co-counsel for Plaintiffs. [Document 49]. Subsequent to these appearance, counsel for Plaintiffs filed several other items with the Court. Additionally, the Court entered a Scheduling Order

[Document 52] and an order granting Plaintiffs' request for a stay of the case during the pendency of the appeal [Document 57]. Plaintiffs never complained of not receiving notice of any of these orders, which were all served via electronic service to the email addresses on file with the ECF system.

Federal Rule of Civil Procedure 5 was amended effective December 1, 2018. The amended rule eliminates the need for a certificate of service, where service is effectuated by electronic service via the Court's ECF system.

The City filed its Motion to Dismiss on January 1, 2019, after the date of the amended rule regarding certificates of service. [Document 60]. Therefore, service and notice thereof were complete when the City's Motion to Dismiss was filed with the Court. Plaintiffs' response to the City's motion was due on January 29, 2019. Local Civil Rule 7.1(e). Plaintiffs filed no response, and the Court granted the City's Motion to Dismiss on February 4, 2019. [Document 61].

II. ARGUMENT & AUTHORITIES

A. Plaintiffs Received Proper Service Under Rule 5

Federal Rule of Civil Procedure 5 was amended effective December 1, 2018. FED. R. CIV. P. 5. Rule 5(b)(E) provides that a paper is served by sending it to a registered user by filing it with the court's electronic-filing system ("ECF"), and Rule 5(d)(1) eliminates the need for a certificate of service where the pleading is served by the court's ECF system. This Court's own Local Civil Rules provide that delivery of the notice of electronic filing that is automatically generated by ECF constitutes service on each party who is a registered user of ECF. Local Civil Rule 5.1(d). Moreover, attorneys are required to register with the Court's ECF system within 14 days of appearing in a case. Local Civil Rule 5.1(f).

Plaintiffs' counsel complain that (1) Mr. Wise did not receive service at the email address listed in Defendant City's certificate of service (because of his failure to register for ECF), and (2) although Mr. Douglas actually did receive email notice through ECF, he was not specifically listed on Defendant City's certificate of service. Although the City included a certificate of service in its Motion to Dismiss, such certificate was actually made unnecessary by Rule 5 because service was effective when the notice of electronic filing was sent to each party who was a registered user of ECF. FED. R. CIV. P. 5; Local Civil Rule 5.1(d). By counsel for Plaintiffs' own admission, Mr. Wise failed to register for the ECF system within 14 days of entering an appearance [Document 63 ¶ 9] and has still not registered to this day. *See* Exhibit A, Notice of Electronic Filing for [Document 63]. Moreover, counsel admits that Mr. Douglas, lead counsel for Plaintiffs, was served via ECF. [Document 63 ¶¶ 8, 11]. It should also be noted that counsel for Plaintiffs included almost identical language in their certificate of service for their Motion for New Trial as the City included in its Motion to Dismiss. *Compare* Document 63 *with* Document 60. So just as Plaintiffs' counsel has relied on Rule 5 of the Federal Rules to effectuate service of their Motion for New Trial upon the City, so too did the City when it filed its Motion to Dismiss.

B. Plaintiffs Have Not Set Forth Sufficient Grounds For Relief From Judgment

Despite titling their motion as one for a new trial, it is in fact a motion for reconsideration, or alternatively a motion to alter or amend a judgment under Rule 59(e) of the Federal Rules (as there was no trial). The Federal Rules do not specifically provide for motions for reconsideration. *Shepherd v. Int'l Paper Co.*, 372 F.3d 326, 328 (5th Cir. 2004). Instead, such motions are analyzed under Rule 59(e) or Rule 60(b) depending upon when the motion is filed. *Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998). Plaintiffs filed their motion within 28 days after the judgment was entered in this case on February 4, 2019; Rule 59(e) therefore applies.

Federal Rule of Civil Procedure 59(e) provides for a court's alteration or amendment of a judgment to correct a manifest error of law or fact, to account for newly discovered evidence, or to accommodate an intervening change in controlling law. *Schiller v. Physicians Res. Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). Rule 59(e) motions are not meant to attempt to relitigate matters that should have been urged earlier or that simply have been resolved to the movant's displeasure. *Sanders v. Bell Helicopter Textron, Inc.*, No. 4:04-CV-254-Y, 2005 U.S. Dist. LEXIS 46920, 2005 WL 6090228, at *1 (N.D. Tex. Oct. 25, 2005) (citing *Templet v. Hydrochem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004)). On the contrary, the remedy provided by Rule 59(e) is extraordinary and should be used sparingly. *Templet*, 367 F.3d at 479. The "remedy is so extraordinary that the standard under Rule 59(e) 'favors denial of motions to alter or amend a judgment.'" *Sanders,* 2005 U.S. Dist. LEXIS 46920, 2005 WL 6090228, at *1 (quoting *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993)).

Plaintiffs have not put forth a valid ground for alteration or amendment of the final judgment under Rule 59(e). Accordingly, their motion should be denied, and the judgment in this case should stand.

Even if Plaintiffs could proceed under Rule 60(b)(1), their motion should likewise be denied. For Rule 60(b) relief, Plaintiffs must show mistake, inadvertence, surprise, or excusable neglect. Fed. R. Civ. P. 60(b)(1). Plaintiffs argue that the judgment should be set aside due to excusable negligence on the part of counsel based on their (1) not registering for ECF; (2) relying on an assistant to provide counsel with court filings; and (3) not checking a "junk" email box for ECF filing notifications. Gross carelessness and ignorance of the rules, however, are *in*excusable neglect and therefore insufficient bases for Rule 60(b)(1) relief. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993). The Fifth Circuit has stated that Rule 60(b) relief is only to

be afforded in "unique circumstances," and counsel has a duty to diligently inquire about the status of his case. *Id.* The Court further stated, "a court would abuse its discretion if it were to reopen a case under Rule 60(b)(1) when the reason asserted as justifying relief is one attributable solely to counsel's carelessness with or misapprehension of the law or the applicable rules of court." *Id.* Finally, in a similar case where counsel argued that failure to update an email address on file with the Southern District of Texas causing him to miss notices of court filings was a "simple clerical mistake," the district court held that counsel did not fulfill his "duty of diligence to inquire about the status of a case" and denied Rule 60(b)(1) relief. *Walker v. Transfrontera CV de SA*, Civil Action No. 5:13-cv-118, 2014 U.S. Dist. LEXIS 187597, at *4–5 (S.D. Tex. Sept. 19, 2014) (citing *Edward H. Bohlin*, 6 F.3d at 356–57), *aff'd*, 634 F. App'x 422 (5th Cir. 2015); *see also Ichie Chibuzo Onwuchekwe v. Okeke*, 404 F. App'x 911, 911–12 (5th Cir. 2010) (holding it was not an abuse of discretion for the district court to conclude that "sending court communications to the spam folder is inexcusable neglect").

WHEREFORE, PREMISES CONSIDERED, Defendant City of Fort Worth prays that the Court deny Plaintiffs' Motion for New Trial and enter judgment in the City's favor on all causes of action.

Respectfully submitted,

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Northern District of Texas

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